Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GLORIA KELLEY, PETITIONER

VS.

KLUGER, PERETZ, KAPLAN AND BERLIN, P.A.,
LINDA FIVES, AND HOWARD BERLIN,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 11TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GLORIA KELLEY, PRO SE
10564 S.W. 112 AVENUE
MIAMI, FLORIDA 33176
Tel. No. 305-279-5785

10 cpp

QUESTION PRESENTED

Does a federal court have jurisdiction to decide ***novel*** issues of state law in an ***improperly*** removed case and ***contrary*** to the 1990 Amendment to U.S. 28 Section 1441c (Amended Remand clause), thereby creating a ***conflict*** with Florida Supreme Court decision, Scott v. Otis Elevator, 572 So.2d 902 (Fla. 1990), and U.S. Supreme Court decisions, Yellow Freight Systems, Inc. v. Donnelly, 494 U.S. 820 (1990), 110 S.Ct. 1566; Taflin v. Levitt, 493 U.S. 455 (1990)?

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PETITION FOR WRIT OF CERTIORARI

The Honorable Judge Francis Birch, Jr., Judge of the 11th Judicial Circuit Court of Appeals, in his dissenting opinion in In RE: City of Mobile, 75 F.3d 605 (11th Cir. 1996), (App.6 p.10) states:

> My review of the legislative history for the applicable 1990 amendment to section 1441(c) ***convinces*** me that the district court was authorized under this statute to remand the entire underlying case to state court. (Emphasis supplied).
>
> ...To focus on the "separate and independent claim" language of section 1441(c),...fails to view the statute in context or to give meaning to the ability now accorded a district court to remand "all matters in which state law predominates." U.S.C. Sec. 1441(c)...this former interpretation, however, would ***subvert*** (emphasis supplied) amended section 1441(c) of its present meaning by precluding the remand of all matters in which state law predominates (Emphasis supplied by Judge

> Birch)[1]. See Mountain States Tel. & Tel. Co., 472 U.S. at 249, 105 S.Ct. at 2594 (holding that specific statutory language cannot be interpreted so as to render other language within the same statute inoperative or meaningless).

In Mobile, Id. the Circuit Court refused to remand the matter to the state court because the claim was not "separate and independent."

I, Plaintiff/Petitioner, hereby ***ADOPT*** **JUDGE BIRCH'S DISSENTING OPINION** (App.6 p.10)in its entirety, in support of my request that a writ of certiorari issue to review the Order entered by the 11th Judicial Court of Appeals dated June 9, 1998 (App.4) affirming removal jurisdiction contrary to the **1990 Amendment** to 1441(c) (hereinafter "Amendment"), ***and dismissing the four novel issues of state law--issues of great "local importance which only the state courts are uniquely fit to determine."*** Alexander v. Goldome Credit Corp., 772F. Supp. 1217 (M.D. Ala. 1991)

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[1]**Bold text** represents emphasis supplied by Judge Birch. Bold, italicized and underlined text represents my emphasis.

Affirming federal jurisdiction and dismissing the four ***novel*** issues of state law are in conflict with: (1) Florida's Supreme Court decision on Scott v. Otis Elevator, 572 So.2d 902 (Fla. 1990) dealing with retaliatory discharge in violation of public policy; (2) Florida's 3rd District Appellate Court's decision on Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA 1985) stating that because a tort is unfamiliar, that does not prevent the State's appeal courts from recognizing it; (3) U.S. Supreme Court decisions on Yellow Freight Systems, Inc. v. Donnelly, 494 U.S. 820 (1990), 110 S.Ct. 1566; Taflin v. Levitt, 493 U.S. 455 (1990), stating that state courts have concurrent jurisdiction over Title VII claims.

OPINIONS BELOW

The opinions at issue are unreported.

STATEMENT OF JURISDICTION

The Order to be reviewed is the 11th Judicial Circuit Court of Appeals order dated June 9, 1998, (App.4) affirming jurisdiction of the ***improperly*** removed case and ***contrary*** to the ***Amendment***, and dismissing the ***novel*** state law claims for failure to state a cause of action. A timely petition for rehearing en banc was filed, which the Court treated as a petition for rehearing, and it was denied on August 3, 1998. (App.5).

This Court's jurisdiction is invoked under Title 28, U.S. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 1990 Amendment to Section 1441(c), 28 U.S.C.; H.R.Rep. No. 101-734, 101st Cong.,2d Sess., at 22-23 (1990) (Federal Courts Study Committee Implementation Act of 1990). Congress amended the statute in 1990 to provide:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claim or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, ***may remand all matters in which state law predominates*** (emphasis added)

28 U.S.C. Section 1441(c).

STATEMENT OF THE CASE

1. On April 2, 1993, I, GLORIA KELLEY, proceeding pro se, filed my Complaint in State Court for wrongful, retaliatory and discriminatory termination in violation of public policy from my job as a legal secretary at Defendant law

firm, Kluger, Peretz, Kaplan and Berlin, P.A.

2. Specifically, my original complaint, asserted one discrimination Count and four (4) state-law counts which ***presented novel issues of great "local importance, which only the state courts are uniquely fit to determine.***" Alexander v. Goldome Credit Corp., 772F. Supp. 1217 (M.D. Ala. 1991) (in interpreting the 1990 Amendment and remanding the entire case, federal claim included, to the state court.

3. The Counts of my original complaint are as follows: (1) Count I, Breach of Duty, at p.6 of the Complaint; (2) Count II, Tort of Retaliatory Discharge, at p.10 of the Complaint; (3) Count IV, Wrongful Termination, at p.16 of the Complaint; (4) Count V, Damages of Emotional Distress at p.19 of the Complaint; (5) Count III, Discrimination in Promotion and Firing Practices, at p.13 of the Complaint, of which Count, the state courts have concurrent jurisdiction, Yellow Freight Systems, Inc. v. Donnelly, 494 U.S. 820 (1990), 110 S.Ct. 1566; Taflin v. Levitt, 493 U.S. 455 (1990). My Complaint seeks damages against my former employer, KPKB; Berlin, a partner of KPKB; and Fives, the office administrator of KPKB for statutory and common law violations arising out of the wrongful, retaliatory and

discriminatory discharge in violation of public policy.

4. I served Defendants on April 7, 1993.

5. Defendants removed the case from state court to federal court (R-1). I objected to the removal (R-8). The District Court dismissed my discrimination claim and gave me 14 days to state a proper federal claim in its Order dated December 3, 1993 (App.1)[2] I amended my complaint to prevent dismissal and to save the refiling fee. The Report and Recommendation dated May 12, 1994 (App.2) dismissed my ***novel*** state law claims. I objected to the dismissal and to the removal (R-42, 92). The Court entered its order dated June 7, 1994 adopting the Report and Recommendation dismissing my ***novel*** state law claims (App.3).

6. The District Court entered summary judgment against me on February 26, 1997. (R-255).

7. I appealed the final judgment to the 11th Circuit Court of Appeals under the Amendment. ***Instead***, the Circuit Court affirmed removal under U.S.C. Sec. 1441(a) and under 28 U.S.C. Sec. 1367(a) relating

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[2]This in itself proves that I do not belong in federal court.

to ***supplemental*** jurisdiction.

8. In my petition for Rehearing en banc, I specifically requested that the Court apply to my case the principles espoused in 28 U.S.C. Sec. 1367(a)(1)(2)(3) ***within the context of the Amendment***. The appeals court denied my motion for rehearing.

9. The Appeals Court turned down the opportunity to address my issue on appeal relating to the ***Amendment*** as it applies to U.S.C. 28 Sec. 1367(a)(1)(2)(3) which states that district courts may decline to exercise ***supplemental jurisdiction*** over a claim under Sec. 1367(a)(1)(2)(3) relating to (1) claims raising novel or complex issue of state law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction. These specific issues mirror my case.

REASONS FOR GRANTING THE WRIT

I. THE PETITION MUST BE GRANTED BECAUSE THE U.S. COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

10. The Supreme Court must settle

the interpretation of the 1990 ***Amendment*** because:

> (1)the present application of the former interpretation and application of Sec. 1441(c) in City of Mobile, Id., would ***subvert*** (emphasis supplied) Section 1441(c) of its present meaning by precluding the remand of all matters in which state law predominates. (Judge Birch dissenting) (App.6 p.10);

and

(2) its interpretation continues to be problematic: "The ever problematic language of 28 U.S.C. Sec. 1441(c) [separate and independent claim]" Perkins v. Halex Co. Div. of Scott Fetzer, 744 F.Supp. 169 (N.D. Ohio 1990) (in interpreting and applying the 1990 Amendment and remanding the entire case, federal claim included, in which state law predominates, to the State court).

II. THE PETITION MUST BE GRANTED TO CURE THE CONFLICT WITH FLORIDA SUPREME COURT DECISION

11. Florida Supreme Court Decision Supporting the Tort of Retaliatory Discharge and Wrongful Termination in Violation of Public Policy: In its June 9, 1998 decision, the Circuit Court stated at page 3 (App.4 p.4) that "There is no cause of action based in common law tort for wrongful dismissal... retaliation."

However, in Scott v. Otis Elevator, 572 So.2d 902 (Fla. 1990), the Supreme Court dealt with the ***tort of retaliatory discharge and wrongful termination in violation of public policy.*** In its opinion the Florida Supreme Court stated:

> ...***the tort of retaliatory discharge*** is grounded on intent...an intent to bring about a result which will invade the interests of another in a way that the law forbids. ***Wrongful termination of employment*** in violation of public policy evidences an intent...that contravenes a clear mandate of public policy. Thus wrongful termination of employment in violation of public policy can be accurately characterized as an intentional tort. (Emphasis supplied)

The Court went on to say that this wrongful termination ***gives rise to damages of emotional distress.***

12. Webster's Third New International Dictionary of the English Language (Unabridged) defines "public policy" as follows:

> The governing policy within a community as embodied in its legislative and judicial enactments which serve as a basis for determining what acts

> are to be regarded as contrary to public policy.

13. Discrimination is against public policy.

14. Further, I relied on Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA 1985) which states that:

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action where none has been recognized before...The law of torts is anything but static, and the limits of its developments are never set. When it becomes clear that the Plaintiff's interest are entitled to legal protection against the conduct of the Defendant, the mere fact that the claim is novel will not, of itself, operate as a bar to the remedy. (Emphasis supplied).

Id. at 1312 (quoting W. Prosser, Torts Sec.221, pp.3-4 (4thEd. 1971)).

III. THE PETITION MUST BE GRANTED BECAUSE THE U.S. COURT OF APPEALS DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

15. U.S. Supreme Court Decisions supporting my case: The U.S. Supreme Court states that state courts have concurrent jurisdiction over Title VII claims. Yellow Freight Systems, Inc. v. Donnelly, 494 U.S. 820 (1990), 110 S.Ct. 1566; Taflin v. Levitt, 493 U.S. 455 (1990).

IV. THE PETITION MUST BE GRANTED BECAUSE THE U.S. COURT OF APPEALS DECISION HAS SANCTIONED SO FAR A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT THIS COURT'S SUPERVISORY POWER MUST BE EXERCISED.

16. Federal Case Law Supporting my Case: Judge Birch states (App.6 p.10) that district courts have been the primary federal courts to interpret and to apply Section 1441(c) since its amendment in 1990, in remanding cases to state court, federal claim included, where state law predominates. He cites the following cases: Alexander ex rel. Alexander v. Goldome Credit Corp., 772 F. Supp. 1217, 1222-25 (M.D. Ala. 1991); Holland v. World Omni Leasing, Inc., 764 F. Supp. 1442, 1443-44 (N.D. Ala. 1991); Martin v. Drummond Coal Co. 756 F. Supp. 524, 525-27 (N.D. Ala. 1991) accord Burnett v. Birmingham Bd. of Educ., 861 F. Supp.

1036, 1037-39 (N.D. Ala. 1994).

17. Judge Birch also states that Martin, Id. was the first federal court to interpret Section 1441(c) following its amendment in 1990, and that district courts ***nationwide*** (emphasis supplied) have relied on Martin and its progeny in our circuit and followed its reasoning. Note 6, p.612 of dissenting opinion (App.6 p.10).

CONCLUSION

18. This Court must grant certiorari to decide the four issues, raised by the question I am presenting to this Court, as follows:

(1) "The present application of the former interpretation in City of Mobile, Id.,

> would ***subvert*** (emphasis supplied) Amended Section 1441(c) of its present meaning by precluding the remand of all matters in which state law predominates." Judge Birch dissenting in City of Mobile, Id. (App.6 p.10);

(2) to cure the conflict with existing Florida Supreme Court decision;

(3) To cure the conflict with U.S.

Supreme Court decisions.

(4) This Court must exercise it supervisory power because the U.S. Court of appeals decision has sanctioned so far a departure from the accepted and usual course of judicial proceedings.

Because of all of the foregoing, my case must be remanded to State court for jury trial, as requested in the Complaint.

Respectfully submitted,

Gloria Kelley

GLORIA KELLEY, PRO SE
10564 S.W. 112 Avenue
Miami, FL 33176
Tel. No. (305) 279-5785

cc: Judge Birch, 11th Circuit Court of Appeals

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 93-0806-CIV-MOORE

[Filed by D.C., Dec. 3, 1993]

GLORIA KELLEY,
Plaintiff,

vs.

KLUGER, PERETZ, KAPLAN and BERLIN P.A., LINDA FIVES and HOWARD J. BERLIN,
Defendants.

ORDER ON MAGISTRATE'S REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Defendants' Motion to Dismiss (DE #2). THE MATTER was referred to the Honorable Ted. E. Bandstra, United States Magistrate. A Report and Recommendation dated August 23, 1993 has been filed, recommending that the Complaint be dismissed.

Accordingly, after a de novo review of the record herein, and being otherwise fully advised in the premises, the Court enters the following Order.

On April 2, 1993, Plaintiff Gloria Kelley, proceeding pro se, commenced this action against the law firm of Kluger,

Peretz, Kaplan & Berlin, P.A., its office administrator, Linda Fives, and one of its partners, Howard J. Berlin. Plaintiff's handwritten complaint, totalling two hundred and forty-five pages including exhibits, consists of various allegations concerning her discharge by the Defendants. Plaintiff's federal law claims consist of alleged violation of her constitutional rights pursuant to 42 U.S.C. Sec. 1983 (preamble to Complaint) and Title Vii of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e (Count III). Plaintiff's state law claims consist of breach of duty (Count I), retaliatory discharge (Count II), and wrongful termination (Count IV.)

Magistrate Judge Bandstra addressed only the federal law claims.[1] Judge Bandstra first recommended that Plaintiff's claim under 42 U.S.C. Sec. 1983 be dismissed because Defendants are not state actors and it is not alleged that they acted under color of law. In her August 11, 1993 Objections to the Report and Recommendation, Plaintiff

[1]Because Judge Bandstra recommended dismissal of the federal claims, he recommended that this Court decline to exercise supplemental jurisdiction over the Plaintiff's remaining pendant state law claims. Accordingly, Judge Bandstra did not address those claims.

agrees to the dismissal of this Count. Accordingly, the 42 U.S.C. Sec. 1983 Count (preamble) is dismissed with prejudice.

As to the alleged violation of Title VII, 42 U.S.C. Sec. 2000e, the Magistrate Judge recommended dismissal of the Complaint because Plaintiff had not filed her right-to-sue from the Equal Employment Opportunity Commission ("EEOC"). On the same day that the Magistrate Judge issued his Report and Recommendation, Plaintiff filed her right-to-sue letter. As a result, this Court cannot adopt and affirm the Magistrate Judge's Report and Recommendation to the extent that it relied on the lack of a right-to-sue letter.

However,Defendants have asked this Court to consider their previously offered grounds for dismissal of Count III's Title VII claim. In the Motion to Dismiss, Defendants point out that Plaintiff has failed suit against Berlin and Fives "individually and as agents" of the employer law firm. This Circuit has held that a Title VII claim is inappropriate against individuals and such an action should be brought against the employer or supervisory employees as agents of the employer only. Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991). Count III's allegation against Berlin and Fives individually is improper. Accordingly, Count III's Title VII allegation is

dismissed with prejudice against Defendants Berlin and Fives.

Defendants also correctly point out that Plaintiff's Complaint fails to state that she is a member of a protected group or that she has been discriminated against on the basis of any protected status. Being a member of a protected class is a prerequisite to establishing a prima facie case of discrimination. Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989). As Magistrate Bandstra correctly indicated, Plaintiff's Complaint consists of a "rambling recitation of plaintiff's grievances with respect to the manner in which defendants terminated her employment." She has not alleged any discrimination based on a protected class under Title VII. Moreover, Plaintiff barely responded to Defendant's Motion to Dismiss and failed to refute any of the statements in the motion or to provide any memoranda of law in opposition except to allege that Defendants have filed motions for "harassing purposes." Accordingly, the Title Vii claim against Defendant Kluger, Peretz, Kaplan & Berlin is dismissed. However, because Plaintiff's charge with the EEOC stated that she felt she was discriminated against on the basis of her Colombia national origin, this Court shall grant dismissal without prejudice and Plaintiff is free to amend her complaint against Defendant Kluger, Peretz, Kaplan & Berlin within fourteen

(14) days.

Because the federal claims have been dismissed, this Court adopts the recommendation of Magistrate Judge Bandstra and at this point declines to address Plaintiff's state law claims unless and until a proper federal claim is asserted. Accordingly, it is

ORDERED AND ADJUDGED that the Magistrate Judge's Report and Recommendation of August 4, 19983, be, and the same is, hereby MODIFIED AND ADOPTED as follows.

ORDERED that Defendants' Motion to Dismiss Plaintiff's 42 U.S.C. Sec. 1983 Count (preamble) is GRANTED and that this Count is DISMISSED with prejudice.

FURTHER ORDERED that Plaintiff's Motion to Dismiss Count III's Title VII allegation is GRANTED as to Defendants Berlin and Fives and that Count is DISMISSED with prejudice against those Defendants.

FURTHER ORDERED that Plaintiff's Motion to Dismiss Count III's Title VII allegation against Defendant Kluger, Peretz, Kaplan & Berlin is GRANTED and Count III is DISMISSED without prejudice. Plaintiff SHALL file a proper amended complaint within fourteen (14) days. Failure to do so will result in dismissal

of this action.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of December, 1993.

s/ K. M. Moore
UNITED STATES DISTRICT JUDGE

copies provided:
U.S. Magistrate Judge Barry L. Garber
Gloria Kelley, Pro SE
Paul C. Heidman, Esq.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 93-0806-CIV-MOORE

GLORIA KELLEY,
Plaintiff,

vs.

KLUGER, PERETZ, KAPLAN and BERLIN P.A., LINDA FIVES and HOWARD J. BERLIN,
Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on (1) Defendants' Motion to Dismiss Amended Complaint filed on December 17, 1993; and (2) Plaintiff's Motion for Entry of Summary Judgment filed on December 22, 1993. Previously, this cause was referred to United States Magistrate Ted. E. Bandstra for all pretrial matters pursuant to 28 U.S.C. Sec 636(b). Accordingly, the undersigned conducted a hearing on these motions on March 31, 1994. Having carefully considered the pleadings, exhibits and other evidence presented by the parties, oral argument of the parties and applicable law, the undersigned respectfully recommends:

a. that Defendants' Motion to Dismiss be GRANTED as to Counts I, II and IV and DENIED as to Counts III and V.

b. that Plaintiff's Motion for Summary Judgment be DENIED with leave to refile after completion of further discovery and final disposition of the above motion to dismiss.[1]

INTRODUCTION

On April 2, 1993, Gloria Kelley ("plaintiff"), proceeding pro se, commenced this action with the filing of a complaint against the law firm of Kluger, Peretz, Kaplan and Berlin, P.A., its office administrator, Linda Fives, and one of its partners, Howard Berlin (collectively referred to herein as "defendants") seeking, inter alia, compensatory and punitive damages under federal civil rights statutes and the

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[1]The undersigned has considered only the motion to dismiss at this time, finding that plaintiff's motion for summary judgment was filed prior to an adequate period of discovery and would be more appropriately resolved after disposition of the instant motion to dismiss. Accordingly, the undersigned recommends that this motion be addressed after completion of such discovery and after the issuance of a Court Order on this report and recommendation.

common law of the State of Florida.[2] This action arises out of plaintiff's alleged wrongful termination of employment by defendants as a legal secretary.

On April 23, 1993, defendants filed a motion to dismiss the complaint which, following full briefing, was heard at oral argument before the undersigned on July 13, 1993. As a result, the undersigned issued a Report and Recommendation on August 4, 1993, recommending that defendants' motion to dismiss be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure as to the federal claims brought under 42 U.S.C. Sec. 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, with leave to file an amended complaint. The undersigned also recommended that this Court decline to exercise supplemental jurisdiction over plaintiff's remaining pendent state law claims.

By Order dated December 3, 1993, that Report and Recommendation was adopted by the District Court to the extent that

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[2]This action was originally commenced in the Eleventh Judicial Circuit Court in and for Dade County, Florida. On April 27, 1993, defendants removed this case to this Court on the basis of original (federal question) jurisdiction pursuant to 28 U.S.C. Secs. 1331 and 1441.

Plaintiff's Sec. 1983 claim was dismissed with prejudice; plaintiff's Title VII claim against defendants Fives and Berlin was dismissed with prejudice; and Plaintiff's Title VII claim against Defendant Kluger, Peretz, Kaplan & Berlin was dismissed without prejudice. The Court declined to "address [p]laintiff's state law claims unless and until a proper federal claim is asserted." See Court Order, pg.4 (D.E. 51). In addition, the Court granted plaintiff leave to file "a proper amended complaint within fourteen (14) days." Id.[3]

On December 9, 1993, plaintiff filed an amended complaint suing defendants in five separate counts for breach of duty (Count I), retaliatory discharge (Count II), discrimination in promotion and firing practices (Title VII, 42 U.S.C. Sec. 2000e) Count III, wrongful termination (Count IV) and damages (Count V). The amended complaint names the same

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[3]Just hours after the Report and Recommendation of the undersigned was issued, plaintiff filed her right-to-sue notice from the Equal Employment Opportunity Commission ("EEOC"). As a result, the Court declined to adopt the undersigned's recommendation that plaintiff's Title VII claim be dismissed as premature for failure to allege receipt of a right-to-sue notice.

parties as defendants and, except for dropping the Sec. 1983 claim, sets forth the same federal and state law claims as previously pled in the original complaint together with over two hundred pages of exhibits attached to the original and amended complaints. The amended complaint also modifies and/or expands the Title VII claim in response to pleading deficiencies found by the Court in the original complaint. Additionally, the amended complaint consists of a new preamble which appears to assert claims for alleged violations of plaintiff's constitutional rights to the pursuit of happiness and freedom of speech. Am.Cpt., para. 12. Nevertheless defendants continue to challenge the sufficiency of the allegations of the amended complaint in the instant motion to dismiss.

STANDARD OF REVIEW

A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts that would entitle her to relief. Bradberry v. Pinella County, 789 F.2d 1513, 1515 (11th Cir. 1986). In ruling on a motion to dismiss, a federal court must view the complaint in the light most favorable to the plaintiff and take its allegation as true. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984); Quinone v. Durkis, 638 F.Supp. 856 (S.D. Fla. 1986). When a

federal court considers a motion to dismiss at the pleadings stage, it must apply the federal rules of civil procedure. Fed.R.Civ.P.8(a) requires that a complaint state a "short and plain statement of the claim showing that the pleader is entitled to relief." Caster v. Hennessey, 781 F.2d 1569, 1570 (11th Cir. 1986). Courts have interpreted this standard liberally. While the pleading must be sufficient to give the defendant fair notice of what the claim is and the grounds upon which it rests, the pleader is not required to set forth in detail the facts upon which the claim is based. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99 (1957); Neizil v. Williams, 543 F.Supp.899 (M.D.Fla. 1982). Finally, the issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 426 U.S. 232, 236 (1974); Hammer v. Armstrong World Industries, 679 F.Supp. 1096, 1098 (S.D.Fla. 1987).

CONCLUSIONS OF LAW

Defendants move to dismiss all counts of the amended complaint for failure to comply with the general pleading requirements of Rule 8 of the Federal Rules of Civil Procedure and for failing to state causes of action upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). The issues

raised with respect to each count are addressed individually below.

I. Federal Claims

1. Title VII (Count III)

In Count III of the amended complaint, plaintiff alleges that she was "discriminatorily and retaliatorily" fired by defendants on the basis of her national origin, Hispanic, in violation of her rights secured by Title VII of the Civil Rights Act of 1962, 42 U.S.C. Sec. 2000e, et seq. and the Civil Rights Act of 1991.[4] Plaintiff further alleges that she was denied a promotion and/or transfer by defendants due to her Hispanic heritage and in violation of the law firm's seniority system.

Defendants move to dismiss the Title VII claim in its entirety on the ground that plaintiff failed to file the amended complaint within ninety (90) days of receipt of her Notice of Right to Sue from the EEOC. Alternatively, defendants argue that plaintiff is barred from maintaining this claim to the extent it alleges that

[4]Basically, the Civil Rights Act of 1991 modified employment discrimination law by allowing compensatory and punitive damages for victims of intentional discrimination and jury trials for the Title VII claims.

she was discriminatorily denied a promotion or transfer because these allegations were not contained within the administrative charge filed with the EEOC.[5]

A. Filing Requirements

The procedural background to this case is pertinent to the issues raised by defendants' instant motion to dismiss. Plaintiff initially pursued her administrative remedies in proceedings before the Metropolitan Dade County Equal Opportunity Board and the EEOC alleging

[5]To the extent that Count III of the amended complaint asserts a Title VII claim against defendants Fives and Berlin in their individual capacities, defendants also seek dismissal of this count for failure to state a cause of action against these defendants. As defendants correctly note, this Court has previously dismissed plaintiff's Title VII claim against defendants Fives and Berlin with prejudice, finding that a Title VII claim is inappropriate against persons in their individual capacities. See Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991); December 3, 1993 Court Order (D.E. 51). Based on the Court's previous Order,the undersigned recommends that Count III of the amended complaint be dismissed with prejudice as to defendants Fives and Berlin.

that she had been subjected to employment discrimination by the law firm of Kluger, Peretz, Kaplan & Berlin on the basis of her national origin, Colombian. The administrative charges were filed on or about February 2, 1993. On April 2, 1993, plaintiff commenced the instant action by the filing of a complaint against defendants for alleged violations of her constitutional rights pursuant to 42 U.S.C. Sec. 1983 and the Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, concerning the manner in which defendants terminated her employment. Shortly thereafter, defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted arguing, inter alia, that the Title VII claim was deficient for failing to allege that plaintiff had been discriminated against on the basis of any protected status. Defendants also argued that plaintiff failed to state a claim under Title VII because she failed to exhaust the required administrative remedies in that she had not yet received a "Right to Sue" letter from the EEOC.

During the pendency of defendants' motion to dismiss, plaintiff received a Notice of Right to Sue from the EEOC dated August 3, 1993. Plaintiff filed the notice with this Court on August 4, 1993. On December 3, 1993, this Court entered an order dismissing the Title VII claim against Kluger, Peretz, Kaplan and Berlin

without prejudice and granted plaintiff leave to amend her complaint against this defendant within fourteen (14) days.[6] Plaintiff filed the amended complaint on December 9, 1993, over ninety (90) days after receipt of the Notice of Right to Sue.

On December 17, 1993, defendants filed the instant motion to dismiss arguing that the amended complaint was filed in excess of ninety (90) days following receipt of a Notice of Right to Sue issued by the EEOC and thus, is time barred pursuant to the filing requirement proscribed by 42 U.S.C. Sec. 2000e-5(f)(1).[7]

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[6]Again, the undersigned notes that the Title VII claim against defendants Fives and Berlin was dismissed with prejudice.

[7]Section 2000e-(f)(1) of Title VII provide in pertinent part:
[i]f a charge [of discrimination] filed with the [Equal Employment Opportunity] Commission is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge...the Commission has not filed a civil action...the Commission...shall so notify the person aggrieved and within ninety days after the filing of such notice a civil action may be brought against the respondent named in the charge...42 U.S.C. Sec. 2000e-5(f)(1).

Plaintiff responds by arguing that any failure to adhere to the Title VII procedural requirements should be excused under the doctrine of equitable tolling. Alternatively, plaintiff argues that the amended complaint is not time barred in that it relates back to the date of filing of the original complaint under Fed.R.Civ.P.15(c).

Reviewing the positions of the parties and applicable law, the undersigned begins by noting that while the procedural requirements mandated by Title VII appear absolute, the United States Supreme Court in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127 (1982) has held that "...filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in a federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling." Id., 455 U.S. at 393. In so holding, the Supreme Court reasoned that finding the filing requirement to be subject to equitable modification furthers the remedial purpose of the act without negating the particular purpose of the filing requirement, which is to give prompt notice to the employer. Id., 102 S.Ct. at 1132-34. Following the Zipes rational, several courts have explicitly held that receipt of a right to sue notice is not a jurisdictional prerequisite to suit but rather is a

condition precedent, which may be equitably modified. See e.g., Pinkard v. Pullmann-Standard, 678 F.2d 1211, 1215 (5th Cir. 1982); Gooding v. Warner-Lambert Co., 744F.2d 354, 358 (3rd Cir. 1984); Purdue v. Roy Stone Transfer Corp., 690 F.2d 1091, 1093 (4th Cir. 1982).

In this case, plaintiff does not allege nor does the record indicate that defendants contributed to plaintiff's late filing of her Title VII claim. Where an employer had not induced plaintiff's inaction, the following five factors may be considered by a court in the determination of whether to toll the filing requirements of Sec. 2000e-5(f)(1): (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirements. Wilburn v. Dial Corp., 724 F.Supp. 530, 533 (W.D. Tenn. 1989), citing Andrews v. Orr, 851 F.2d 146, 151 (6th Cir. 1988). Further, although absence of prejudice to the defendant is one factor for consideration, this factor alone does not constitute an independent basis for applying the doctrine of equitable tolling. See Baldwin County Welcome Center V.Brown,m 466 U.S. 147, 152, 104 S.Ct. 1723 (1984).

Applying these factors to the instant case, the undersigned finds that the ninety day statutory period should be tolled on equitable grounds. Plaintiff does not argue a lack of actual or constructive knowledge of the filing requirements of Sec. 2000e-5(f)(1). Indeed the Notice of Right to Sue issued to plaintiff specifically states "[i]f you intend to sue, you must do so within ninety (90) days of your receipt of this notice: Otherwise your right to sue is lost." See, D.E. 40. Rather, Plaintiff argues that any timeliness problem should be excused since she did eventually receive and filed her Notice of Right to Sue. Plaintiff explains that she did not file an amended complaint within 90 days after receiving the notice because defendants' motion to dismiss the original complaint was still pending. Plaintiff's position is supported by the record which reflects that she amended her complaint immediately following this 'court's Order of December 3, 1993 which suggested that she could set forth further facts to support a claim of discrimination. Moreover, the December 3 Order did not mention plaintiff's failure to comply with the ninety (90) day filing requirement and implied that dismissal would not be premised on the lack of a right to sue letter. See December 3, 1993 Order, page 2 (D.E. 51). Plaintiff's diligence in pursuing this matter is further demonstrated by her filing of pleading

captioned "Notice to Court Re: Protecting My Right to Appeal" prior to the issuance of the December 3 Court Order.

In addition, the undersigned finds that tolling of the ninety (90) day period to file suit would not prejudice defendants. Contrary to defendants' contention, the record reflects that they were on notice of plaintiff's allegation of discrimination when plaintiff filed her original complaint in April 1993 and attached the administrative charge of discrimination based on national origin as an exhibit thereto. In light of the remedial nature of Title VII and the fact that plaintiff is proceeding in this case without the benefit of counsel, the undersigned finds that plaintiff acted reasonably in attempting to preserve her Title VII claim.

In summary, the undersigned finds that the equities in this case justify excusing plaintiff from not complying with the precise filing requirements for a Title VII claim. Accordingly, Count III should not be dismissed for failing to comply with the ninety (90) day filing requirement of Sec. 2000e-5(f)(1).

Assuming, arguendo, that plaintiff is not entitled to equitable tolling, the undersigned nevertheless finds that the amended complaint is timely because it "relates back" to the date of plaintiff's

original complaint under Fed.R.Civ.P.15(c)(2) which states, in relevant part:

> An Amendment of a pleading relates back to the date of the original pleading when
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading....

Fed.R.Civ.P. 15(c)(2). Construing this rule in a situation analogous to the instant case, the Supreme Court in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) noted that in order for an initial pleading to be rehabilitated by Rule 15(c), it must provide defendants fair notice of what the Plaintiff's claim is and the grounds upon which it rests. Baldwin, 466 U.S. at 149, n.3.[8] Relying on

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[8]Specifically, the Court in Baldwin noted that the relation back doctrine would be inapplicable where the plaintiff filed a notice of right to sue letter itself within the ninety day requirement but subsequently filed the actual complaint outside the ninety day period since the filing of the right to sue letter did not give the defendants fair notice of plaintiff's claims nor the grounds upon which they rested.

Baldwin, defendants argue that the "relation back" doctrine is inapplicable here since plaintiff's initial complaint did not give defendants fair notice of the Title VII claim nor the grounds upon which it rested in that it did not identify national origin as the basis of plaintiff's alleged discrimination. The undersigned disagrees.

Here, unlike in Baldwin, plaintiff's original complaint gave defendant's fair notice of plaintiff's claim and the grounds upon which it rested. As noted above, plaintiff attached as an exhibit to the original complaint the EEOC charge which alleged national origin discrimination. In addition, plaintiff's original complaint refers to the "lay off" of another hispanic individual. Cpt., para.6. Moreover, both plaintiff's original and amended complaints clearly arise out of the same "conduct, transaction or occurrence", i.e., plaintiff's failure to be promoted to a paralegal or transferred to another department and her eventual discharge of employment.

Accordingly, the undersigned finds that plaintiff's amended complaint filed on December 9, 1993 should relate back to April 2,1993, the date plaintiff's original complaint was filed. This finding, however, results in the premature filing of plaintiff's Title VII claim since this claim would relate back to April 2, 1993, approximately four months prior to the issuance of the Right to Sue Notice.

Addressing the issue of premature filing, the Fifth Circuit held that "the receipt of a right-to-sue letter subsequent to the commencement of a Title VII action, but while the action remains pending, satisfies the precondition that a plaintiff obtain statutory notice of the right to sue before filing a civil action." Pinkard v. Pullman Standard, 678 F.2d 1211 (5th Cir. 1982). In so holding, the Court reasoned that:

> A Title VII action filed prior to the receipt of a statutory notice of the right to sue does not preclude the EEOC from performing its administrative functions, and it is unlikely that permitting the subsequent receipt of a right-to-sue letter to cure the filing defect will encourage plaintiffs to attempt to bypass the administrative process because premature suits are subject to a motion to dismiss at any time before notice of the right to sue is received.... To distinguish such an action, once dismissed and then renewed, from an action where the defect is cured while the action remains pending is to distinguish between a glass half full and a glass half empty.

Id. 678 F.2d at 1218. This principle is consistent with the theory that receipt of such notice is not a jurisdictional prerequisite to suit. Zipes v. Trans World Airlines, Inc. supra; Gooding, 744

F.2d at 358.

Finding the reasoning of the Fifth Circuit persuasive, the undersigned finds that plaintiff's subsequent receipt of her Right to Sue Notice cures the premature filing of her Title VII claim with this Court. See also Wilburn v. Dial Corp., 724 F.Supp. 520 (W.D. Tenn. 1989) (receipt of right to sue notice cured premature filing of discrimination complaint).

Accordingly, Count III should not be dismissed on the grounds of untimeliness.

B. Promotion/Transfer Claims

In the event that Count III of the Amended Complaint is not dismissed in its entirety, defendants move to dismiss the allegations of that count concerning plaintiff's claims of discriminatory denial of promotion and transfer on the ground that these claims were not raised in plaintiff's administrative charge filed with the EEOC. In support thereof, defendants correctly note that plaintiff's EEOC charge only alleges that she was laid off because of her national origin.

It is well settled that a plaintiff's complaint under Title VII may encompass only the discrimination stated in the administrative charge itself or developed in the course of a reasonable investigation of that charge by the EEOC. See Sanchez v. Standard Brands, Inc. 431 F.2d 455 (5th Cir. 1970); King v. Seaboard Coastline Railroad Co., 538 F.2d 581, 583 (4th Cir. 1976); Schnellbaecher v. Baskin

Clothing Co., 887 F.2d 124 (7th Cir. 1989). To assist the Court in determining the degree to which the discrimination alleged in a Title VII complaint may vary from that described in the EEOC charge, the Eleventh Circuit has adopted the "like or related" test first articulated in Sanchez, supra. In Sanchez, the Court held that "the allegations in a judicial complaint...'may encompass any kind of discrimination like or related to the allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission.'" Id. at 466, quoting King v. Georgia Power Co., 295 F.Supp. 943, 947 (N.D. Ga. 1968). The Court further stated that "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. Id.; see also Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925 (11th Cir. 1983).

Applying this standard here, the undersigned finds that plaintiff should not be barred from maintaining a Title VII action concerning non-promotion or non-transfer. Specifically, the undersigned finds that plaintiff's allegations of discriminatory promotion and transfer practices by defendants is "like or related to" her EEOC charge alleging discrimination surrounding her lay off. See Falcon v. General Telephone Company of Southwest, 626 F.2d 369, 376-77 (5th Cir. 1980), vacated and remanded, 450 U.S. 1036, 101 S.Ct. 1752 (1981), reinstated in part, 647 F.2d 633 (5th Cir. 1981),

reversed on other grounds, 457 U.S. 147, 102 S.Ct. 2364 (1982) (holding that hiring and promotion practices to be "like or related" where the EEOC investigation had encompassed both). In so holding, the Court in Falcon, recognized that other courts had interpreted the "like or related" rule to permit virtually any claim of discrimination in any are of employment to be considered an "outgrowth" of the charge of discrimination filed with the EEOC. Falcon, 626 F.2d at 377. Although the record here is unclear as to the scope of the Commissions' actual investigations, the undersigned finds that an investigation of defendants' alleged discriminatory promotion and transfer practices could reasonably be expected to grow from plainff's initial charges. See Schnellbaecher v. Baskin Clothing Co., 887 F.2d at 127 (scope of actual investigation by EEOC does not determine what complaint can be filed in Title VII action, determining factor is what Commission investigation could reasonably be expected to grow from original complaint).

In summary, the undersigned finds that plaintiff's allegations regarding promotion and transfer should not be dismissed from Count III. Accordingly, the undersigned recommends that defendants' motion to dismiss Count III be denied.[9]

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[9]In so recommending, the undersigned has also considered and rejected plaintiff's reliance on Fed.R.Civ.P.8(a)(e) as a basis for

2. Pursuit of Happiness Violation (Preamble)

The title and preamble of the amended complaint allege that plaintiff is bringing this action for, inter alia, a violation of her "constitutional right to the pursuit of happiness". Am.Cpt., para.12. Plaintiff alleges that she can only achieve such happiness by earning her livelihood. Id. In support thereof, plaintiff relies on Allgeyer v. Louisiana, 165 U.S. 578 (1897), for the proposition that she has a constitutional right to pursue happiness which includes "the right to follow any of the common occupations of life...." Id. at 589. In Allgeyer, the Supreme Court read into the liberty component of the due process clause of the Fourteenth Amendment the concept of an individual's right to pursue happiness as formulated in the Declaration of Independence.

Defendants move to dismiss this constitutional claim for failure to state a cause of action. Specifically, defendants argue that plaintiff has not and could not properly allege that defendants are governmental actors as required to state a civil rights claim under the due process clause of the Fourteenth Amendment.

In order to state a cause of action under the due process clause of the Fourteenth Amendment, the following four-

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dismissal of Count III.

prong test must be satisfied: (1) a person must have a recognized liberty or property interest at stake; (2) even a temporary deprivation of that liberty or property will be sufficient; (3) there must be some form of state action which deprives the individual of liberty or property; and (4) there must be some legitimate governmental or public reason asserted for depriving an individual of such liberty or property. Craig v. Carson, 449 F.Supp.385, 390 (M.D. Fla. 1978).

Reviewing this claim, the undersigned finds that Plaintiff fails also fails to satisfy the third prong of the Craig's four prong test by failing to allege any form of state action on the part of defendants. Accordingly to the amended complaint, defendants acted strictly in their private capacities as entities, employees, partners or attorneys.

Accordingly, the undersigned recommends that plaintiff's due process claim be dismissed with prejudice for failure to state a cause of action.1 See Flagg Bros. Inc. v. Brooks, 436 U.S. 149. 98 S.Ct. 1729 (1978) ("It is axiomatic that a plaintiff must allege and prove state action to recover under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.") Thus, plaintiff fails to understand that "the Constitution erects no shield against merely private conduct no matter how discriminatory or wrongful." Langley v. Monumental Corp., 496 F.Supp. 1144 (D.C. Md. 1980) citing Shelley v. Kramer, 334 U.S. 11, 68 S.Ct. 836 (1948).

II. State Claims

Having found that plaintiff has sufficiently pled a cause of action under Title VII, the undersigned next addresses plaintiff's sate law claims.

3. Breach of Duty (Count I)

In Count I, plaintiff alleges that defendants breached various duties allegedly owed to plaintiff including (1) a duty of objectivity; (2) a duty to distribute the work in a fair manner; (3) a duty to fulfill the requirements to organize the bankruptcy department and (4) a duty not to discriminate because of national origin. Am.Cpt., para. 9. Plaintiff further alleges that as a result of this breach she suffered harm entitling her to punitive damages and other relief. Am. Cpt., para 11.

Defendants move to dismiss this claim, arguing that no cause of action for breach of duty may be maintained against defendants because plaintiff was an at-will employee. The undersigned agrees.

Under Florida law, "in the absence of a specific statute granting a property interest, a contract of employment (implied or express) which is indefinite as to term of employment is terminable at the will of either party without cause and an action for wrongful discharge will not lie. Kelly v. Gill, 544 So.2d 1162, 1164 (Fla. 5th DCA 1989), cert. denied. 494 U.S. 1029 (1990). See also, Smith v Piezo Technology and Professional

Administrators, 427 So.2d 182 (Fla. 1983). There is also no cause of action based in common law tort for wrongful dismissal such as negligence, malice or retaliation. Kelly, 544 So.2d at 1164. Likewise, a claim for breach of obligation of good faith and fair dealing has not been recognized in Florida as viable cause of action. Id.

Reviewing Count I in light of the above principles, the undersigned finds that plaintiff has failed to state a cause of action for breach of duty. Plaintiff does not allege a statutory provision granting her a property right in continued employment. Nor does plaintiff allege that she had a contract of employment with defendants for a specific duration. Consequently, the undersigned finds that plaintiff was an at-will employee. As such, Plaintiff is not entitled to relief for defendants' alleged breach of the duties listed above.

Accordingly, the undersigned recommends that Count I of the Amended Complaint be dismissed with prejudice for failure to state a cause of action.

4. Tort of Retaliatory Discharge (Count II)

In Count II of the amended complaint, plaintiff alleges that she was discharged from employment in retaliation for exercising her right to freedom of speech. Am.Cpt., para. 18. Plaintiff further alleges that she is entitled to damages for emotional distress as a result of

defendants "intentional, malicious, willful and retaliatory action". Am. Cpt. para. 19-21.

Defendants move to dismiss Count II for failure to state a cause of action on the grounds that Florida does not recognize the common law tort of retaliatory discharge for an at-will employee such as plaintiff. Defendants also argue that plaintiff has failed to state a cause of action for an alleged violation of her right to freedom of speech due to plaintiff's failure and inability to allege that defendants are state actors.

Reviewing Count II, the undersigned finds that plaintiff has failed to state a cause of action for retaliatory discharge. The Florida legislature has not created a statutory action for wrongful discharge in general and no common law cause of action for retaliatory or wrongful discharge exists in Florida. Hartley v. Ocean Reef Club, 476 So.2d 1327, 1330 (Fla 2d DCA 1985); Smith v. Piezo Technology, supra at 184.

Plaintiff attempts to salvage this count by relying on Scott v. Otis Elevator, 572 So.2d 902 (Fla. 1990) for the proposition that an intentional termination of employment in violation of public policy states a cause of action for retaliatory discharge under Florida law. Plaintiff's reliance on Scott is misplaced. In Scott, the Florida Supreme Court held that damages for emotional distress are available to a plaintiff in

an action for wrongful discharge in retaliation for filing a workers' compensation claim. However, this cause of action is specifically provided for by statute. See Fla. Stat. Sec 440.205. Here, plaintiff is not suing under Sec. 440.205 or any similar statutory provision. Accordingly, the undersigned finds that plaintiff has failed to state a cause of action for retaliatory discharge.

The undersigned further finds, for reasons stated above, that plaintiff's allegations concerning alleged violation of her right to freedom of speech fail to state a cause of action because defendants are not state actors.

In summary, the undersigned recommends that Count II of the Amended Complaint be dismissed with prejudice for failure to state a cause of action.

5. Wrongful Termination of Employment (Count IV)

Defendants also move to dismiss plaintiff's wrongful termination claim (Count IV) for failure to state a cause of action. Reviewing this claim, the undersigned also finds it insufficient as a matter of law against these defendants for the same reasons outlined above. See Kelly v. Gill, supra at 1164.

6. Damages (Count V)

In Count V of the Amended Complaint, plaintiff alleges that she is entitled to various forms of damages including, inter

alia, compensatory, punitive and consequential damages. As Defendants correctly note, this section is not properly labeled a "Count" in that is not a statement of a cause of action. Rather, it is plaintiff's prayer for relief. Arguing that plaintiff has not stated any claim upon which relief can be granted, defendants contend that this "Count" should be dismissed or stricken.

Having found, however, that plaintiff has sufficiently pled a cause of action under Title VII, the undersigned finds that plaintiff's prayer for relief should not be dismissed or stricken.

Accordingly, the undersigned recommends that defendants' motion to dismiss Count V be denied but that this count be construed as a prayer for relief rather than a separate cause of action.

CONCLUSION

For all of the foregoing reasons, the undersigned respectfully recommends:

a. that Defendants' Motion to Dismiss be GRANTED as to Count I, II and IV and DENIED as to Counts III and V.

b. that Plaintiff's Motion for Summary Judgment be DENIED with leave to refile after completion of further discovery and final disposition of the above motion to dismiss.

The parties may serve and file written objections to this Report and

Recommendation with the Honorable K. Michael Moore, United States District Judge, within ten (10) days of receipt. See 28 U.S.C. Sec. 636(b)(1)(C); United States v. Warren, 687 F.2d 347 (11th Cir. 1982), cert. denied, 460 U.S. 1087 (1983); and Hardin v. Wainwright, 678 F.2d 589 (5th Cir. Unit B 1982); see also Thomas v. Arn, 474 U.S.140 (1985).

RESPECTFULLY SUBMITTED in Miami, Florida, this 12th day of May, 1994.

s/ TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable K. Michael Moore
All counsel of record

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 93-0806-CIV-MOORE

[Filed by D.C., June 7, 1994]

GLORIA KELLEY,
Plaintiff,

vs.

KLUGER, PERETZ, KAPLAN and BERLIN P.A., LINDA FIVES and HOWARD J. BERLIN,
Defendants.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Defendants' Motion to Dismiss Amended Complaint (DE #54 and Plaintiff's Motion for Summary Judgment (DE #57).

THE MATTER was referred to the Honorable Ted E. Bandstra, United States Magistrate. A Report and Recommendation dated May 12, 1994 has been filed, recommending that the Motion to Dismiss be granted as to Counts I, II and IV and denied as to Counts III and V.[1] The Report

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[1]Subsequent to issuing the Report and Recommendation, Magistrate Bandstra recused himself from this matter. The case has been reassigned to Magistrate

also recommended that the Motion for Summary Judgment be denied with leave to refile after the completion of further discovery. Plaintiff submitted an objection on May 16, 1994 and Defendants submitted an objection on May 26, 1994.

Accordingly, after a de novo review of the entire record herein, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that United States Magistrate Judge Ted E. Bandstra's report and Recommendation of May 12, 1994 be, and the same is hereby ADOPTED in its entirety.

FURTHER ORDERED that the Motion to Dismiss (DE #54) be GRANTED as to Counts I, II and IV and denied as to Counts III and V. Counts I, II and IV are DISMISSED with prejudice.

FURTHER ORDERED that the Motion for Summary Judgment (DE #57) be DENIED without prejudice.

DONE AND ORDERED in Chambers at

Judge Stephen T. Brown.

Miami, Florida, this 7th day of June, 1994.

s/ K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

Copies provided:
Gloria Kelley, Pro Se
James S. Bramnick, Esq.
U.S. Magistrate Judge Stephen T. Brown
U.S. Magistrate Judge Ted E. Bandstra

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4434 Non-Argument Calendar
D.C. Docket No. 93-806-CV-KMM

[DO NOT PUBLISH]

[Filed U.S. Court of Appeals Eleventh Circuit
June 09 1998, Thomas K. Khan, Clerk]

GLORIA KELLEY,
Plaintiff-Appellant,

v.

KLUGER, PERETZ, KAPLAN & BERLIN, P.A., LINDA FIVES, AND HOWARD BERLIN,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(June 9, 1998)

Before BIRCH, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

Gloria Kelley, a hispanic woman, sued her former employer, Kluger, Peretz, Kaplan, & Berlin ("Kluger"), in Florida state court alleging Title VII claims of discriminatory discharge and discriminatory failure to promote based

upon her national origin and state law claims of breach of duty, retaliatory discharge, and wrongful termination. After the defendants removed the case to federal district court, the district court dismissed Kelley's state law claims for failure to state a claim upon which relief could be granted. Subsequently, the district court granted Kluger summary judgment on Kelley's Title VII claims. In this appeal, Kelley argues that the district court erred by (1) allowing her case to be removed to federal court and refusing to remand it to state court; (2) dismissing her state law claims; and (3) granting Kluger summary judgment on her Title VII claims.

We have reviewed Kelley's complaint, supporting affidavits and all of the evidence in the record. Having considered these together with the briefs of the parties, we find no reversible error.

I. DISCUSSION

A. REMOVAL AND REMAND

Kelley's claim that the district court erred in allowing her case to be removed to federal court and not remanding it to state court is meritless. Defendants may remove to federal district court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. Sec. 1441(a). Count III of

Kelley's original complaint alleged that Kluger discriminated against her in violation of the civil Rights Act of 1964. Federal district courts have original jurisdiction over discrimination claims under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. Sec. 2000e-5(f)(3) ("each United States district court...shall have jurisdiction of actions brought under this subchapter). In addition, under 28 U.S.C. Sec. 1367(a), a federal district court has supplemental jurisdiction over state-law claims that are, as is the case here, related to plaintiff's federal claims. Accordingly, removal was proper and the district court did not err in refusing to remand the case to state court.

B. STATE-LAW CLAIMS

Kelley contends that the district court erred in dismissing for failure to state a claim upon which relief can be granted her state-law claims for breach of duty, tort of retaliatory discharge, and wrongful termination. We review de novo the dismissal of a complaint for failure to state a claim. See Harper v. Thomas, 988 F.2d 101, 103 (11th Cir. 1993).

Under Florida Law, in "absence of a specific statute granting a property interest of a contract of employment (implied or express) which is indefinite as to term of employment is terminable at

will of either party without cause and an action for wrongful discharge will not lie....There is also no cause of action based in common law tort for wrongful dismissal such as negligence, malice, or retaliation. It is also clear that breach of an obligation of good faith and fair dealing has not been recognized in Florida as a viable cause of action, at least where a wrongful dismissal is claimed." Kelley v. Gill, 544 So.2d 1162, 1164 (Fla. 5th DCA 1989)(citations and footnotes omitted). Because Kelley was an at-will employee, the district court correctly dismissed Kelley's state-law claims for failure to state a claim under Florida law.

C. TITLE VII CLAIMS

Kelley contends that the district court erred in granting Kluger summary judgment on her Title VII claims. We review de novo a district court's granting of summary judgment. See Hale v. Tallapoosa County, 50F.3d 1579, 1581 (11th Cir. 1995).

1. Discriminatory Discharge Claim

The district court granted Kluger summary judgment on Kelley's claim that Kluger discriminated against her on the basis of her national origin when it terminated her employment on December 29, 1993.

To establish a prima facie case of discriminatory discharge, Kelley was required to establish that (1)she is a member of a protected class; (2)she was discharged from her employment; (3)she was qualified to perform the duties of the job from which she was discharged; and (4)her position was filled by a person outside her protected class. See Edwards v. Wallace Community College, 49 F.3d 1517, 1521 (11th Cir. 1995); McDonnell Douglas v. Green, 411 U.S. 792, 801, 93 S.Ct. 1817, 1824(1973). However, a prima facie case "is not wholly dependent upon meeting the fourth requirement of the McDonnell Douglas test. A plaintiff may have a prima facie case based on the first three requirements despite the fact that the employer hired a minority to fill the vacancy left by the plaintiff....[T]he court must consider whether the fact that a minority was hired overcomes the inference of discrimination otherwise created by the evidence presented by the plaintiff." Edwards, 49 F.ed at 1521. If the plaintiff fails to present "any evidence that the filing of the vacancy by a minority was pretextual" then the plaintiff fails to establish a prima facie case. Id.

Although Kelley satisfied the first three requirements of her prima facie case, she failed to establish the fourth requirement. Kelley testified that she was discharged to make room for Mary

Gaulding. However, Gaulding, like Kelley, is Hispanic. Therefore, her position was not filled by an individual outside her protected class. Furthermore, Kelley failed to fall within the escape hatch provided by the Edwards test, because she did not present any evidence that the defendant's replacement of her with an individual within her protected class was pretextual.

Even assuming, arguendo, that Kelley established a prima facie case of discriminatory discharge, Kluger offered a legitimate, non-discriminatory reason for terminating her. Specifically, Kluger stated that it discharged Kelley because of a slowdown in the bankruptcy department. Once a defendant produces evidence of a legitimate, non-discriminatory reason for the discharge it is plaintiff's burden to come forward with evidence "sufficient to permit a reasonable fact-finder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997). Kelley's failure to meet that burden provides an independent basis for affirming the district court's grant of summary judgment to Kluger on this claim.

Kelley also argues at length that she was fired in retaliation for reporting to her supervisors that Richard Allen, a co-

worker, was sabotaging her work. Assuming that such retaliation was the reason for her termination, it does not show that she was discharged because of her national origin in violation of Title VII.

2. Discriminatory Failure to Promote Claim

Kelley contends that the district court erred in granting Kluger summary judgment on her claim that Kluger discriminated against her on the basis of her national origin when it denied her a promotion to the position of paralegal in Kluger's litigation department. To establish a prima facie case of discriminatory failure to promote, a plaintiff must prove: (1)that she is a member of a protected class; (2)that she was qualified for and applied for the promotion; (3)that she was rejected; and (4) that the other equally or less qualified employees who were not members of the protected class were promoted. See Combs, 106 F.3d at 1539 n.11.

Although Kelley established the first three requirements of her prima facie case, she failed to establish the fourth, because the paralegal position which Kelley sought was filled by Maria Tucci, a Hispanic woman. Kelley contends, however that under Edwards, the failure to establish the fourth element of the prima facie case does not necessarily warrant

dismissal of her case. She argues that after she filed her complaint of discrimination with the Metropolitan Dade County Equal Opportunity Board ("MCDEOB"), Kluger hired Tucci as a pretext to cover up their discrimination in failing to promote her. However, the fact that Tucci was not hired to fill the position until after Kelley filed her MCDEOB complaint does not warrant an inference under the Edwards test that the hiring of Tucci was pretextual. Kluger did not even have an opening for the paralegal position Kelley sought until February 1993, which was after Kelley's termination and the filing of her MCDEOB complaint.

Accordingly, the district court properly granted Kluger summary judgment on the discriminatory failure to promote claim.

II. CONCLUSION

AFFIRMED.

APPENDIX 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4434

[Filed U.S. Court of Appeals Eleventh Circuit
August 3, 1998, Thomas K. Khan, Clerk]

GLORIA KELLEY,
Plaintiff-Appellant,

v.

KLUGER, PERETZ, KAPLAN & BERLIN, P.A., LINDA FIVES, AND HOWARD BERLIN,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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Before: BIRCH, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

S/ CARNES
UNITED STATES CIRCUIT JUDGE

APPENDIX 6

IN RE CITY OF MOBILE
Cite as 75 F.3d 605 (11th Cir. 1996)

In re CITY OF MOBILE, Petitioner.
No. 95-6878
United States Court of Appeals,
Eleventh Circuit
January 31, 1996

Motorist who was injured in collision with second motorist, who was being pursued in high-speed chase by city police officers, sued second motorist and city, alleging various causes of action under Alabama state law, as well as claim under Sec. 1983. After case was removed to federal court, the United States District Court for the Southern District of Alabama, No. CV 95-0509-CB-C, Charles R. Butler, Jr., Chief Judge, granted motion to remand entire case to state court. Defendants petitioned for writ of mandamus. The Court of Appeals, Hatchett, Circuit Judge, held that district court had no discretion to remand to state court case that included properly removed federal claim.

Remanded with directions.

Birch, Circuit Judge, issued dissenting opinion.

(HEADNOTES OMITTED)

John R. Lockett, Cherry, Given, Peters,

Locket & Diaz, P.C., Mobile, AL, for Appellant.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Alabama.

Before HATCHETT, COX and BIRCH, Circuit Judges.

HATCHET, Circuit Judge:

This case is before the panel on a petition for writ of mandamus. We direct the district court to reconsider its decision.

BACKGROUND

On June 29, 1993, Melvin Thornton, Sr. sustained serious injuries when a vehicle driven by Michael Kahalley struck his car. At the time of the collision, officers of the Mobile, Alabama Police Department were engaged in a high-speed chase of Kahalley. On September 20, 1993, Thornton and family members (respondents) filed suit in Alabama state court against Kahalley, the City of Mobile, Police Officer David Preston and various fictitious parties. The suit alleged negligence, wantonness, and dram shop liability causes of actions under Alabama state law. On June 14, 1995, respondents filed a fourth amended complaint adding a cause of action under 42 U.S.C. Sec. 1983 for violation of rights under the Fourth,

Eighth, and Fourteenth Amendments to the United States Constitution. Originally, the case was set for trial in state court on June 26, 1995; it was continued, however, until November 5, 1995. On June 27, 1995, Petitioners, with the exception of Kahalley, removed the case to federal court pursuant to 28 U.S.C. Sec. 1441(b) and (c)

Respondents moved to remand the entire case to state court. The district court in the Southern District of Alabama granted the motion remanding the entire case, including the section 1983 claim, to state court. In support of its order, the district court relied on 28 U.S.C. Sec. 1367(c)(2) and (c)4. Petitioners request that this court issue a writ of mandamus ordering the district court to retain and hear the entire case.

CONTENTIONS

Petitioners contend that the district court erred in remanding the entire case to state court and assert that the district court should have retained all of the claims. Petitioners contend that the language of 28 U.S.C. Sec.1367(c) is clear and unequivocal and only empowers a district court to decline supplemental jurisdiction. Petitioners argue that this court should adopt the reasoning of *Borough of West Mifflin v. Lancaster*, 45 F.3d 780 (3d) Cir. 1995), which prohibited

a district court from remanding a properly removed federal claim to state court.

Respondents contend that remanding an entire case, including a properly removed federal claim, is appropriate under section 1367(c)(2) where the state claims substantially predominate over federal claims. Respondents argue that the district court correctly found that the state law issues substantially predominated over the federal issues. Respondents also contend that under section 1367(c)4, the district court properly remanded the entire case to state court because other compelling reasons exist to remand. Alternatively, respondents contend that the district court could have remanded the entire case under section 1441(c).

ISSUE

The sole issue we address is whether, under 28 U.S.C. Sec. 1367(c), a district court has discretion to remand to state court a case that includes a properly removed federal claim.

DISCUSSION

[1] Initially we note that when a district court remands a case based on reasons not authorized in 28 U.S.C. Sec. 1447(c), we have jurisdiction to review such an order on a petition for

writ of mandamus. *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1257 (11th Cir. 1992).

[2] Section 1267(c) cannot be fairly read as bestowing on district courts the discretion to remand to a state court a case that includes a properly removed federal claim. *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 787 (3d Cir.1995). According to section 1367(a), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C.A. Sec. 1367(c), (West 1993). Under section 1367(c), district courts have a discretion to refuse to exercise supplemental jurisdiction. The section that provides that

> district courts may decline to exercise *supplemental jurisdiction* over a clam under subsection (a) if--
>
> (1) the claim raises a novel or complex issue of state law;
>
> (2) the claim substantially predominates over the claim or claims over which the district

court has original jurisdiction;

(3) the district court has dismissed all claims over which it has original jurisdiction; or

in exceptional circumstances, there are other compelling reasons for deciding jurisdiction.

28 U.S.C.A Sec. 1367(c) (West 1993) (emphasis added).

[3,4] In this case, the district court acknowledged that the terms of section 1367(c) do not expressly authorize it to remand a federal claim to state court, but the court found support for doing so in the doctrine of pendent jurisdiction as construed in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed. 2d 720 (1988). While we accept the district court's conclusion that section is rooted in the doctrine of pendent jurisdiction, we reject its interpretation of *Carnegie-Mellon* as allowing federal courts to remand properly removed federal claims to state court. In *Carnegie-Mellon*, the court addressed the issue of "whether a federal district court has discretion under the doctrine of pendent jurisdiction to remand a properly removed case to state court when all federal-law claims in the action have been eliminated and only pendent state-law claims remain." *Carnegie-Mellon*, 484 U.S. at 345, 108

S.Ct. at 616. The Court concluded that a district court has discretion to remand pendent claims to state court when doing so furthers the principles of judicial economy, convenience, fairness, and comity. *Carnegie-Mellon*, 484 U.S. at 357, 108 S.Ct. at 622-23. The district court in this case relied upon section 1367(c)(2) in concluding that it could remand the entire case including the federal claim to state court.

The district court exceeded its discretionary authority in remanding the entire case pursuant to section 1367(c)(2) and (c)(4) because it remanded the case on grounds not provided for in the controlling statute. *See Thermtron Products v. Hermansdorfer*, 423 U.S. 336, 351, 96 S.Ct. 584, 593, 46 L.Ed.2d 542 (1976) finding that a district court exceeded its authority in remanding a case for reasons not provided for in 28 U.S.C. Sec. 1447(c). While the district court in this case outlined ostensibly compelling reasons for remanding the entire case, we find no support for the district court's decision in section 1367(c), its legislative history, or relevant case law.[1] As the Supreme Court

[1]For example, in deciding to remand the entire case, the district court placed great emphasis on the state court's expenditure of its judicial resources

stated in *Thermtron Products*, "we are not convinced that Congress ever intended to extend carte blanche authority to district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron Products*, 423 U.S. at 351, 96 S.Ct. at 593. Accordingly, we hold that the district court must retain jurisdiction over the properly removed federal claim.

[5,6] Respondents urge this court to find, as an alternative to section 1367(c), that the district court had authority under 28 U.S.C.A. Sec. 1441(c) to remand the entire action. We need not consider this suggestion because we agree with the district court's conclusion that no separate and independent cause of

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during a two-year period in pre-trial matters in preparation for the case.

1. 28 U.S.C. Sec. 1367(c); *See Palmer v. Hospital Auth.*, 22 F.3d 1559, 1563 (11th Cir.1994) ("section 1367 codifies the concepts previously known as pendent and ancillary jurisdiction," and it retains the dichotomy formerly derived from *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218(1966), for accepting or declining supplemental jurisdiction.

action exists under these facts. Under section 1441(c),

> [w]henever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which State law predominates.

U.S.C.A. Sec. 1441(c) (West 1994). The district court correctly found that the claims here were not separate and independent. Where both federal and state causes of action are asserted as a result of a single wrong based on a common event or transaction, no separate and independent federal claim exists under section 1441(c). *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951). In this case, a single accident occurred, and state and federal claims were filed based on that accident. Therefore, section 1441(c) is not applicable because no separate and independent claim exists.

CONCLUSION

Because the district court exceeded its authority in remanding the properly removed federal claim, we direct the district court to reconsider its decision to remand the entire case to state court.

REMANDED.

BIRCH, Circuit Judge, dissenting:

Because I believe that the district court correctly remanded the entire underlying case to state court, albeit under the wrong reasoning and statutory authority, I dissent. I agree with the majority that 28 U.S.C. Sec. 1367(c) was the improper basis to support remand of the entire underlying case, which includes a 42 U.S.C. Sec. 1983 claim, because section 1367(c) accords a district court discretion to decline supplemental jurisdiction over state law claims in definitive situations.[1] I disagree however, with the majority and the district court's dismissal of U.S.C. Sec.1441(c) as the basis for remanding the entire underlying case because the federal claim was not separate and independent from the state claims. My review of the legislative history for the applicable 1990 amendment to section 1441(c) convinces me that the district court was

authorized under the statute to remand the entire underlying case to state court.

I. THE "SEPARATE AND INDEPENDENT CLAIM" LANGUAGE OF SECTION 1441(C)

The amendment of 28 U.S.C. Sec. 1441(c) in 1990 resulted from the recommendation of the Federal Courts Study Committee ("Committee"), which was created by the Judicial Improvements and Access to Justice Act of 1988 to study and report to Congress on certain issues relating to the federal courts. The Committee's recommendations are contained in the Report of the Federal Courts Study Committee ("Report"), dated April 2, 1990. The Committee recommended repeal of section 1441(c), "concerning removal of separate and independent claims," because of the problems encountered in the interpretation of "separate and independent claims" in administering this statute by the federal courts. Report at 94, 95.

The Committee recognized that the "separate and independent claim or cause of action" language of former section 1441(c) related to diversity cases "when the separate claim is against another, non-diverse party." *Id.* The former doctrine of ancillary jurisdiction, now subsumed by supplemental jurisdiction, codified in 28 U.S.C. Sec. 1367, allowed unrelated claims to be joined i na single

lawsuit and occurred in diversity, not in federal question, cases. *See* 28 U.S.C. Sections 1331, 1332. Clearly, diversity jurisdiction was where "most of the difficulties with Sec. 1441(c)" arose as courts and parties attempted to decipher the separateness or relatedness of claims. Report at 95.

Congress, however, did not repeal section 1441(c), but "modified" the statute "so as to eliminate most of the problems that have been encountered in attempting to administer the 'separate and independent claim or cause of action' test" as described by the Report. H.R. Rep. No. 101-734, 101st Cong., 2d Sess., at 22-23 (1990) (Federal Courts Study Committee Implementation Act of 1990). In a manifest attempt to restrict the application of Section 1441(c) to federal question jurisdiction, as opposed to diversity jurisdiction, and to clarify the remand discretion given to district courts, Congress amended the statute in 1990 to provide:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine

> all issues therein, or *in its discretion, may remand all matters in which State law predominates.*

U.S.C. Sec. 1441(c) (emphasis added).

Thus Congress recognized that the "separate and independent claim" problem arose in diversity cases, where the "plaintiff could easily bring a single action on a federal claim and a *completely unrelated state claim*" H.R. Rep. No. 101-734, at 23 (emphasis added). In contrast, Congress acknowledged that federal question jurisdiction, associated with the former doctrine of pendent jurisdiction, involves related claims. This relatedness of state and federal causes of action is so implicit that Congress determined that the amendment of section 1441(c) "would avoid the need to decide whether there is pend[e]nt jurisdiction" in removal and remand. *Id.*

Since amended section 1441(c) concerns only federal question jurisdiction and deletes diversity jurisdiction, now covered by section 1441(b), Congress undertook to relieve federal judges from determining whether the state and federal causes of action are related or unrelated. In federal questions cases, these causes of action are related. "The further amendment to Sec. 1441(c) that would *permit remand of*

all matters in which state law predominates also should simplify administration of the separate and independent claims removal." *Id.* (emphasis added). Indeed, the congressionally edited version of section 1441(c), showing the deleted and added wording, makes plain that a deliberate choice has been made from allowing a district court to remand "all matters not otherwise within its original jurisdiction" to "*may remand all matters in which State law predominates.*" *Id.* at 50. Whereas the district court formerly had no choice in retaining a federal claim, it now may remand an entire case, including the federal question claim, if state law predominates. *See Maine v. Thiboutot*, 448 U.S. 1, 3 n.1, 100 S.Ct. 2502, 2503 n.1, 65 L.Ed.2d 555 (1980) recognizing that federal courts do not have exclusive jurisdiction to adjudicate section 1983 claims, since state court have concurrent jurisdiction (citing *Martinez v. California*, 444 U.S. 277, 283-84 n. 7, 100 S.Ct. 553, 558 n. 7, 62 L.Ed.2d 481 (1980))); *See also* 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure Sec. 3573, at p. 196 (1984) (acknowledging that "it is now settled" that federal and state courts have concurrent jurisdiction in section 1983 cases.) Accordingly, "separate and independent claim or causes of action" in section 1441(c) means a legitimate basis of federal jurisdiction

apart from jurisdiction under state law claims.

In view of the legislative history, the majority's use of *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951), for the proposition that no separate and independent cause of action can exist under section 1441(c), when federal and state claims arise from a common event, is unpersuasive in the context of a federal question case. *Finn* is a diversity case, and it was remanded to state court because of the lack of complete diversity, the basis for federal jurisdiction.[2] Indeed, the Court defined a controversy between citizens of different states as "'separable'" *Id.* at 10, 71 S.Ct. at 538. That is, the "single wrong," which is the basis of the diversity case, is separate and independent from an unrelated or ancillary claim that destroys complete diversity. *Id.* at 14, 71 S.Ct. at 540.

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[2]In reversing the Fifth Circuit and remanding the case with instructions that it be remanded to state court, the Supreme Court concluded: "In this case, however, the District Court would not have had original jurisdiction of this suit, as first stated in the complaint because of the presence on each side of a citizen of Texas. *Finn*, 341 U.S. at 17, 71 S.Ct. at 541-42 (citing 28 U.S.C. Sec. 1332).

Noting the difficulty in interpreting the meaning of "'separate and independent claim or cause of action,'" the Court found that an "important purpose" in the then-operative revision of Sec. 1441(c) was to "limit removal from state courts." *Id.* at 9-10, 71 S.Ct. at 538. Thus, *Finn* addresses diversity jurisdiction and not federal question jurisdiction, where the claims are intertwined.

In *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988), decided on principles of pendent jurisdiction because the federal claims had been eliminated and only state law claims remained,[3] the Court explained

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[3]In *Carnegie-Mellon*, the "single federal-law claim in the action was eliminated at an early stage of the litigation" giving the district court "a powerful reason to choose not to continue to exercise jurisdiction." 484 U.S. at 351, 108 S.Ct. at 619. In contrast, the underlying case in this petition had been pending for two years in state court, discovery was completed, and the case was set for trial before removal to federal court. The pivotal issue in *Carnegie-Mellon* was whether the district court should relinquish jurisdiction by dismissing the case, consisting of the pendent state law claims, without prejudice or by remanding it to state

that "[s]ections 1441(c) and 1447(c)...do not apply to cases over which a federal court has pendent jurisdiction. Thus, the remand authority conferred by the removal statute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all." *Id.* at 355 n.11, 108 S.Ct. at 621 n.11. The presently applicable 1990 amendment to section 1441(c), which followed *Carnegie-Mellon* decision, gives district courts the ability to remand "all matters," or entire case, to state court if state law predominates.

II. STATUTORY INTERPRETATION AND APPLICATION

A. *Principles of Statutory Construction*

We review a district court's interpretation and application of a statute *de novo*. *International Union v. Jim Walter Resources, Inc.*, 6 F.3d 722, 724 (11th Cir. 1993). When statutory language is clear and unambiguous, the

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court. *Id.* In confirming the judicial economy and comity principles of *Gibbs*, the Court concluded that remand was preferable to dismissal, which might preclude a plaintiff from litigating claims because of the expiration of the statute of limitations. *Id.* at 351-53, 108 S.Ct. at 619-20.

language controls "*absent a legislative intent to the contrary.*" *United States v. Chandler*, 996 F.2d 1073, 1084 (11th Cir. 1993) citing *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981)) (emphasis added), *cert denied*, ____ U.S. _____, 114 S.Ct. 2724, 129 L.Ed.2d 848 (1994). Only when the statutory language is unclear do we resort to legislative history. *United States v. Rojas-Contreras*, 474 U.S. 231, 235, 106 S.Ct. 555, 557, 88 L.Ed.2d 537 (1985); *see United states v. Castro*, 829 F.2d 1038, 1049 (11th Cir. 1987) ("Our objective when interpreting a statute is to determine the drafters' intent."), *modified on other grounds*, 837 F.2d 441 (11th Cir. 1988). "In determining the meaning of the statute we look not only to the particular statutory language, but to the *design of the statute as a whole and to its object and policy.*" *Crandon v. United States*, 494 U.S. 152, 153, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990) (emphasis added); *accord McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991); *Chandler*, 996 F.2d at 1084. Thus, statutory language must be interpreted in context, and not in isolation, to effectuate the statutory purpose. *Department of Revenue v. ACF Indus., Inc.*,___ U.S. _____, _____, 114 S.Ct. 843, 848, 127 L.Ed. 165 (1994); *see City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners, L.P.)*, 27

F.3d 534, 537 (11th Cir. 1994) (per curiam) holding that statutory language should not be construed separately or in a vacuum, but within the meaning of the whole statute).

Accordingly, courts cannot pronounce a statutory interpretation that would thwart the legislative purpose of a particular statute. *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978). "A change of [statutory] language is some evidence of a change of purpose..." *Johnson v. United States*, 225 U.S. 405, 415, 32 S.Ct. 748, 751, 56 L.Ed. 1142 (1912); *accord McElroy v. United States*, 455 U.S. 642, 650-52 n. 14 102 S.Ct. 1332, 1337 n. 14, 71 L.Ed.2d 522 (1982). An interpretation of statutory language that causes other language within the statute to be meaningless contravenes the "'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249, 105 S.Ct. 2587, 2594, 86 L.Ed.2d 168 (1985) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979)).

B. *Judicial Interpretation*

The congressional amendment of section 1441(c) in 1990 resulted from problematic judicial interpretations of

"separate and independent claim" in the former version of the statute.[4] Therefore, the legislative history addressed in the previous section is crucial to our understanding of the meaning of "separate and independent claim" within the context of section 1441(c) as amended. Because present section 1441(c) is limited to federal question jurisdiction, state law claims will be related to the federal claim(s). Thus, "separate and independent claim" cannot mean that the federal claim is unrelated to the state claims. Furthermore, amended section 1441(c) now authorizes the district court to remand all matters in which state law

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[4]Despite congressional efforts at clarifying Sec. 1441(c), it is manifest that reasonable jurists continue to differ concerning the interpretation of this statute evidenced by the district court in the underlying case and the majority's view versus mine. *See Burnett v. Birmingham Bd. of Educ.*, 861 F.Supp. 1036, 1038-39 (N.D. Ala. 1994) (listing district courts that have followed the interpretation of Sec. 1441(c) by the district courts in our circuit permitting remand of a case containing a federal cause of action where state law predominate, which is my interpretation, and district courts that would agree with the district court in the underlying case and the majority's interpretation).

predominates; it no longer is required to retain the federal claim as it was in the previous version of the statute.[5] *See Johnson*, 255 U.S. at 415, 32 S.Ct. at 751 (determining that a legislative change in statutory language constitutes evidence of a change in the statutory purpose).

To focus on the "separate and independent claim" language of section 1441(c), as the majority and the district court have done, fails to view the statute in context or to give meaning to the ability now accorded a district court to remand "all matters in which State law predominates." 28 U.S.C. Sec. 1441(c). Under the majority and the district court's interpretation, which is the former interpretation and application of section 1441(c), the district court cannot remand the 42 U.S.C. Sec. 1983 claim, but must retain that claim in federal court because the federal claim is not separate and independent from the state law claims. This former interpretation, however, would

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[5] "*Prior to its amendment,* Section 1441(c) permitted a district court to remand any separate and independent matter 'not otherwise within its original jurisdiction." In other words, a district court could remand the state law claims not within its original jurisdiction but was *required to retain the federal law claims." Moore v. DeBiase*, 766 F.Supp. 1311, 1320 (D.N.J. 1991) (citations omitted) (emphasis added).

subvert amended section 1441(c) of its present meaning by precluding the remand of all matters in which state law predominates. *See Mountain States Tel. & Tel. Co.*, 472 U.S. at 249, 105 S.Ct. at 2594 (holding that specific statutory language cannot be interpreted so as to render other language within the same statute inoperative or meaningless).

Since the 1990 amendment of section 1441(c), district court[6] in our circuit

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[6]District courts have been the primary federal courts to interpret and to apply Sec. 1441(c) since its amendment in 1990. Even the Third Circuit, which addresses amended Sec. 1441(c) in *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 786 (3d Cir. 1995), endorsed by the majority, adopts the rationale of a Southern District of Ohio case, *Kabealo v. Davis*, 829 F.Supp. 923 (S.D. Ohio (1993), *aff'd mem.*, 72 F.3d 129 (6th Cir.1995). *Lancaster* also cites *Buchner v. F.D.I.C.*, 981 F.2d 816 (5th Cir. 1993), which presents the opposite factual and legal scenario from the underlying case in this petition. Under Sec. 1441(c), the Fifth Circuit concluded that federal, not state law claims, predominated because, "[a]s the FDIC is a party to the present suit, all of the component claims are conclusively deemed to have arisen under federal law." *Id.* at 819. Accordingly,

uniformly have interpreted the revised statute to accord discretion to district courts to remand an entire case, including a federal claim to state court if state law predominates. *Alexander ex rel. Alexander v. Goldome Credit Corp.*, 772 F.Supp. 1217, 1222-25 (M.D.Ala.1991); *Holland v. World Omni Leasing, Inc.*, 764 F. Supp. 1442, 1443-44 (N.D.Ala.1991); *Martin v. Drummond Coal Co.*, 756 F.Supp. 524, 525-27 (N.D.Ala.1991)[7]; *accord Burnett v. Birmingham Bd. of Educ.*, 861 F.Supp.

Buchner is not analogous to the underlying case in this petition. Furthermore, the Fifth Circuit in *Buchner* did not consider the legislative history behind the 1990 amendment of Sec. 1441(c).

[7]*Martin* was the first federal court to interpret Sec. 1441(c) following its amendment in 1990. District courts nationwide have relied on *Martin* and its progeny in our circuit and followed its reasoning. *See, e.g., Bodenner v. Graves*, 828 F.Supp. 516, 519 (W.D. Mich. 1993); *Lang v. American Elec. Power Co.*, 785 F.Supp. 1331, 1334-35 (N.D. Ind.1992); *Morales v. Meat Cutters Local*, 539, 778 F.Supp. 368, 370-71 (E.D.Mich. 1991); *Moore v. DeBiase*, 766 F.Supp. 1311, 1316 n.9, 1319 (D.N.J.1991). *Lancaster*, on which the majority relies, specifically rejects *Martin* and *Holland* from our circuits as the proper analysis. *Lancaster*, 45 F.3d at 787.

1036, 1037-39 (N.D.Ala.1994). "The present words 'may remand all matters in which State law predominates' were substituted for the former words 'may remand all matters not otherwise within its original jurisdiction.' This is a dramatic change."[8] *Martin*, 756 F.Supp. at 525. *"[E]ven if there is a federal question* identified in plaintiff's well-

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[8]*See Moore*, 766 F.Supp. at 1320 ("'Matters,' in the context of the prior version of section 1441(c), could only be interpreted to mean a discrete claim or cause of action and not the entire case.... Although Congress retained the term 'matters,' it eliminated the limitation to only claims or causes of action not within the district court's original jurisdiction."); *see also Alexander*, 772 F.Supp. at 1224-25 ("Note that the word used by the statute is still 'matters.' The federal court can remand all 'matters' in which state law predominates. If 'matters' is construed to include all 'claims,' then a combination of claims in which a *federal claim is one but in which state law is found to 'predominate' may justify a remand of the whole case, with the federal claim included."* (quoting David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec.1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 78 (1991) (emphasis added)).

pleaded complaint, as is true in the instant case, *Sec. 1441(c) can still justify remanding the entire case 'if state law predominates.'"* *Holland,* 764 F.Supp. at 1444 (quoting 28 U.S.C. Sec. 1441(c) (emphasis added); *See Moore v. DeBiase,* 766 F.Supp. 1311, 1321 (D.N.J.1991) ("Congress, by granting the discretion to remand all matters in which state law predominates, intended to permit a district court to remand the *entire case and not just the state law claims."* (emphasis added)).

Significantly, in cases where the federal claim is "so intertwined with" as to be "indistinguishable from" the state law claims, making it "very difficult", i[f] not impossible, to treat separately," the federal court's retaining the case only because of the federal claim "invariably" would result in a "race-to-judgment between the federal court and the state court, and the first court to decide its case might create a serious *res judicata* problem for the other court." *Holland* 764 F.Supp. at 1444; *see Moore,* 766 F.Supp. at 1321 (*"Remand of the entire matter, including the section 1983 claims,* is even more compelling in this case because the federal law claims are factually tied to all of the state law claims." (citing *Martin,* 756 F.Supp. at 527) (emphasis added)). In remanding the entire case, including the federal Truth in Lending Act claim, to state court

because state law predominated, the district court determined that "[a]llowing for a *remand of the entire case* allows a court to *avoid piecemeal litigation* and to properly *limit those cases removed to federal court to those that truly present federal issues.*" *Alexander*, 772 F.Supp. at 1225 (emphasis added).

C. *Determination of State Law Predomination*

Because Congress did not explain explicitly how to determine when state law predominates over federal question jurisdiction where pleadings invoke both state and federal law, "a value judgment by the federal court" is required. *Martin* 756 F.Supp. at 527; *accord Moore*, 766 F.Supp. at 1319. State law predominates "'[i]f the federal court finds that the federal claim, while plausible, is not really the plaintiff's main mission; that it is only an incident or adjunct of the state claim and that the state claim is the crux of the action....'" *Moore*, 766 F.Supp at 1319 (quoting 28 U.S.C.A. Sec. 1441 Commentary (West Supp.1991); *see Burnett*, 861 F.Supp. at 1038 ("Employing the routinely accepted proposition that removal statutes are always to be construed against removal, the language of Sec. 1441(c) cannot be interpreted to recognize an exception for all state cases which simply contain a claim invoking 42 U.S.C. Sec. 1983 as to which state courts

have concurrent jurisdiction. A district court decides whether state law predominates by examining the "nature of the claims as set forth in the pleading and by determining whether the state law claims are more complex or require more judicial resources to adjudicate or are more salient in the case as a whole than the federal law claims." *Moore,* 766 F.Supp. at 1319 (footnote omitted). Thus, Congress accorded district courts "*broad discretion* in determining whether to retain a removed case or to remand it entirely to state court. *Id.* (emphasis added).

The district court in this petition analyzed its reasons for concluding that state law predominates in the underlying case, although in context of 28 U.S.C. Sec. 1367(c)(2).[9] *See Bodenner v. Graves,*

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[9]Recognizing that determining that state law predominates is not merely a numerical count of the respective claims, the district court in the underlying case used the *Gibbs* standard for comparing the state and federal claims "in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought." *Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139. As to type and amount of damages available under the federal and state claims, the district judge determined that there is little difference because there

is no liability caps under either federal or state claims as to the five named defendants other than the City of Mobile. *Thornton v. Kahalley,* No. 95-0509-CB-C, slip op. at 9-10 (S.D.Ala. Sept. 20, 1995) (order granting plaintiff's motion to remand the entire case to state court) [hereinafter "Remand Order"]. In contrast, the district judge found "pervasive differences in both the standard and elements of proof" for the state versus the federal claims. *Id.* at 10. Under the Alabama Dram Shop Act, the district judge explained that the relevant defendants could be strictly liable for their actions, and that the remaining state common law claims permit recovery on a showing of negligence or wantonness.

Under Sec. 1983, the district judge recognized that a plaintiff is required to show gross negligence or deliberate indifference resulting from an official policy or custom. Thus, the district judge concluded that the standard of proof for the Sec. 1983 claim was "substantially higher" than that for the various state law claims. *Id.* Additionally, the district judge found that "there are marked differences in the means available to a plaintiff to establish his case under Sec. 1983 and the state law claims." *Id.* at 11; *see Gibbs,* 383 U.S. at 726, 86 S.Ct. at 1139 ("Needless decisions of

828 F.Supp. 516, 518 (W.D. Mich.1993) noting that the language of section 1441(c) relating to the discretion of the district court to remand "'all matters in which State law predominates'... closely mirrors that of Sec. 1367(c)(2)." (quoting 28 U.S.C. Sec. 1441(c)). Irrespective of whether section 1441(c) or section 1367(c)(2) is applied, the facts and claims are the same. Finally, the underlying case has been proceeding in state court for two years through discovery, and it was scheduled for trial before addition of section 1983 claim and removal to federal court; clearly, the state court is in a better position to adjudicate the issues in the underlying case.[10] The district court acted within

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state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them surer-footed reading of applicable law.").

[10]In its remand order for the underlying case, the district judge explained:

> The state judiciary has already invested substantial resources in this case, has resolved numerous discovery and other preliminary matters, and has developed familiarity and expertise over the factual and legal issues in this cause of

its discretion accorded by Section 1441(c), as amended in 1990, in remanding the entire underlying case after determining that state law predominated.

III. CONCLUSION

I conclude that the majority errs in limiting its discussion to supplemental jurisdiction under 28 U.S.C. Sec. 1367(c), and in failing to analyze the district court's remand of the entire underlying case under 28 U.S.C. Sec. 1441(c) as amended. The legislative history behind the 1990 amendment of section 1441(c) reveals that "separate and independent claim" does not mean that the federal claim is unrelated to the state law claims in a federal question case. "Separate and independent claim" refers to a legitimate federal jurisdictional basis. In a case involving both valid federal and state law claims, the district court must determine

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> action which this court presently lacks. It would be neither an economical nor a convenient allocation of judicial resources for this court to seize jurisdiction over this entire action at the eleventh hour of the state litigation.

Remad Order at 12.

that state law claims predominate if it decides to remand the entire case. I believe that the district court correctly remanded the entire underlying case to state court based on the predominance of state law claims, although I do not endorse its statutory authority for the remand under section 1367(c) concerning supplemental jurisdiction.

Apparently, the majority sees the dilemma of trial of federal claims in federal court and trial of related state claims in state court as presenting the problems of conflicting federal and state adjudications, race to judgment and *res judicata*; hence the implicit suggestion to the district court that it adjudicate all claims, state and federal. Because the majority's interpretation of "separate and independent claim" in section 1441(c) as well as its resolution makes the ability of district court to remand all matters to state court under the statue devoid of meaning, I cannot accept it. The majority's interpretation and resolution is particularly unsatisfactory in this underlying case where the district judge, as factfinder, has determined that state claims predominate, and that it is appropriate to adjudicate the single, lately added federal claim in state court. Because I would have dismissed the mandamus petition for the reasons explained herein and upheld the district court's remand of the entire underlying

case to state court, I respectfully dissent.